

STATE OF MICHIGAN
COURT OF APPEALS

MARTIN MCDERMENT, GALE
MCDERMENT, MICHAEL BAYOFF, SUSAN
BAYOFF, JOE MILLS, CHRIS MILLS, LEE
SHARKAS, MARCI SHARKAS, JOHN
SOULET, ANJELA SOULET, CHRIS
MAKEPEACE, DEBBIE MAKEPEACE,
RICHARD PRICE, MICHAELA PRICE, MARK
SHOEMAKER, PAMELA SHOEMAKER,
DAVID LIVERMORE, THERESE LIVERMORE,
JOHN WALKER, VALERIE WALKER,
HOWARD FISHER, NANCE FISHER, TRACY
PARKS, PAMELA PARKS, PAUL MILEWSKI,
and GERALYN MILEWSKI,

Plaintiffs-Appellants,

v

BILTMORE PROPERTIES, INC., BIRKDALE
POINTE SUBDIVISION HOMEOWNER'S
ASSOCIATION, and TRACI PHILLIPS, d/b/a
PRINCIPAL PROPERTY MANAGEMENT,

Defendants-Appellees,

and

TOLL BROTHERS, INC., THE SILVERMAN
BUILDING COMPANIES, INC., HQZ
ACQUISITIONS, INC., and TOWNSHIP OF
COMMERCE,

Defendants.

UNPUBLISHED
December 29, 2005

No. 257155
Oakland Circuit Court
LC No. 2002-044667-CZ

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right various orders entered by the trial court, including the court's orders granting summary disposition in favor of defendants Biltmore Properties, Inc. ("Biltmore"), and Birkdale Pointe Subdivision Homeowners Association ("Association"). This action regards a dispute with respect to a subdivision's recorded plat, the declaration of restrictions relative to the subdivision ("declaration"), the Association's articles of incorporation, and an amendment to the declaration of restrictions ("amended declaration") that resulted in the annexation of property. Plaintiffs filed a ten-count complaint, alleging causes of action for breach of fiduciary duty, fraudulent misrepresentation, silent fraud, violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq.*, an accounting, declaratory judgment, promissory estoppel, breach of implied duty of good faith and fair dealing, state action, and injunctive relief. Defendants Toll Brothers, Silverman Building Companies, HQZ Acquisitions, and Commerce Township were dismissed pursuant to stipulations and are not involved in this appeal. A default was entered against defendant Traci Phillips, d/b/a Principal Property Management; however, a default judgment was never entered, and the trial court subsequently dismissed the complaint in its entirety.¹ Biltmore and the Association (collectively "defendants") entered into a stipulation with plaintiffs resulting in the dismissal of all claims, except the claims for breach of fiduciary duty, an accounting, and declaratory judgment. These disputed claims were summarily dismissed by the trial court and are the subject of this appeal, along with arguments presented by plaintiffs that the trial court erred in finding that the amended declaration was valid and enforceable, erred in denying a motion for leave to amend the complaint to add claims of trespass and nuisance, and erred in dismissing the case in its entirety, where the complaint set forth a factual basis for claims sounding in trespass and nuisance. We affirm the trial court's ruling that the amended declaration was valid and enforceable, affirm the dismissal of the breach of fiduciary duty claims brought against defendants, and affirm the court's ruling rejecting plaintiffs' argument that there existed embedded trespass and nuisance claims within the complaint that should have been allowed to proceed. We reverse the trial court's dismissal of the declaratory judgment claim with respect to Biltmore and the Association and remand for further proceedings, reverse the dismissal of the accounting claim as pursued under MCL 450.2487(1) only and remand for entry of judgment in favor of plaintiffs pursuant to that statute, and remand in regard to the court's ruling denying the motion to amend the complaint for further findings.

A. Summary Disposition Tests and Standards of Review

MCR 2.116(C)(8) provides for summary dismissal of an action where the plaintiff "has failed to state a claim on which relief can be granted." A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A (C)(8) motion should be granted if no factual development could possibly justify recovery. *Id.* at 130.

¹ Plaintiffs fail to frame any appellate issue regarding dismissal of defendant Phillips; therefore, we decline to pursue the matter any further.

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

This Court reviews de novo a trial court's ruling to either grant or deny a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Further, questions of law in general are reviewed de novo. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004). Whether a duty is owed to a plaintiff is a question of law for the court to decide. *Beaudrie, supra* at 130.

B. Validity and Enforceability of First Amendment to the Declaration of Restrictions²

Plaintiffs argue that the trial court erred in granting defendants' motion for summary disposition in which the court found, as a matter of law, that the amended declaration was valid and enforceable. We disagree. Our Supreme Court recently reiterated that "[w]here the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted." *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003), citing *Gawrylak v Cowie*, 350 Mich 679, 683; 86 NW2d 809 (1957); see also *Dyball v Lennox*, 260 Mich App 698, 704; 680 NW2d 522 (2004). In the context of interpreting a deed, the Michigan Supreme Court stated that the objective is to give effect to the parties' intent as manifested in the language of the instrument. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc.*, 472 Mich 359, 370; 699 NW2d 272 (2005). Consideration must be given to the whole of the deed and to each and every part. *Id.* No language in the instrument may be needlessly rejected as meaningless, and, where possible, all the language must be harmonized and construed such as to make it all meaningful. *Id.* When interpreting restrictive covenants, where the intent of the parties is clearly ascertainable, the courts must give effect to the instrument as a whole. *Village*

² Although we shall refer to this instrument as the amended declaration for ease of reference, it was actually an amendment to the original declaration, leaving the original declaration intact and adding restrictions and covenants regarding the new annexed subdivision, along with setting rules impacting the subdivisions and the Association as a result of the annexation.

of Hickory Pointe Homeowners Ass'n v Smyk, 262 Mich App 512, 515-516; 686 NW2d 506 (2004). These construction principles are applicable to the documents at issue here.

We conclude that the trial court did not commit error in ruling that the amended declaration was valid and enforceable. The amended declaration added or annexed Birkdale Pointe Subdivision No. 2 (“Birkdale 2”) to Birkdale Pointe Subdivision No. 1 (“Birkdale 1”), allowed for the establishment of retaining walls and accompanying easements on Birkdale 2 lots, declared the retaining walls and related easements as common area that will be maintained by the Association, addressed easements granted to the township, and added a covenant for maintenance assessments to be paid by the Association relative to the costs of storm drains, storm water drainage facilities, and retention basins. The key language from the original declaration provided:

This Declaration may be amended during the first twenty (20) year period by an instrument signed by not less than eighty (80%) percent of the Owners and thereafter by an instrument signed by not less than seventy (70%) percent of the Owners, *except that amendments made by Declarant for the purpose of adding residential lots and/or Common Area to the control or ownership by the Association and making this Declaration apply to such lots and/or Common Area shall not require the vote, signature or approval of any Owners, the Association or any members thereof*, and, prior to the Voting Transfer Date . . . , Declarant shall be entitled to amend this Declaration as Declarant deems appropriate in its sole and absolute discretion. Any amendment must be recorded with the Oakland County Register of Deeds.

Declarant reserves the right *at any time or times in the future* to amend this Declaration by adding to it one or more additional subdivisions of land in the Northeast ¼ of Section 9 of the Township of Commerce which may be hereafter developed and platted by Declarant or its assigns. Such additional subdivisions may or may not contain Common Area. Any such amendment(s) to this Declaration shall provide that the Owners of all residential lots in such future added subdivisions shall be required to be Members of the Association and shall be subject to the covenants, restrictions, easements, charges and liens set forth herein. Such amendment(s) shall also provide that the Common Area contained within The Subdivision and all such future annexed subdivisions shall be for the use and benefit of all Owners of lots in The Subdivision and all such future annexed subdivisions. *Additional lots and Common Area may be annexed to the Association by Declarant without the consent or approval of the Association or any of its Members or any Owner.* Annexation by action of the Association shall require the consent of two-thirds (2/3) of its Members. [Emphasis added.]

This language gave Biltmore the sole and absolute authority to annex Birkdale 2 and to amend the declaration at any time with respect to the annexation and for any related purposes without any consent or approval by the Association, members, or owners. The amended declaration encompassed matters directly related to the annexation, i.e., property addition, construction of retaining walls in Birkdale 2, easements and common area in Birkdale 2, and maintenance assessments. As we read the original declaration, the relevancy of the “voting transfer date” pertains only to any amendments unrelated to annexation; therefore, it is

unnecessary to determine for purposes of this issue whether Biltmore's actions in amending the declaration in February 2001 occurred at a time after the voting transfer date had passed. The amended declaration *on its face* was valid and enforceable.

When one focuses on the essence of plaintiffs' grievances with defendants' actions, the grievances are more complaints as to how Biltmore went about constructing and developing Birkdale 2, which, according to the documentary evidence, involved impairment or destruction of common area, the parks, located in Birkdale 1, with benefit only to Birkdale 2 lot owners, and which brought on such problems as flooding, lost use of a nature area, loss of pleasing aesthetic qualities, creation of an eye sore and nuisance, and diminution of property values. These issues provide grounds for allowing the declaratory judgment action to proceed, which matter we shall discuss *infra*. We note that, under the original declaration, any common area located in Birkdale 1 would also become common area for any annexed property, which was eventually Birkdale 2, and *visa versa*. Accordingly Birkdale 1 parks became common area for both Birkdale 1 and Birkdale 2 lot owners, or the Association members at large. Regarding maintenance assessments associated with the annexation and the work necessary to handle drainage issues in Birkdale 2, including the construction of retaining walls and maintenance of common area, clearly assessments would be part of any annexation and development of Birkdale 2. The original declaration indicated that assessments were to be used to "promote the recreation, health, safety, and welfare of the residents in the Subdivision *and future subdivisions hereafter annexed*, and in particular for the construction, reconstruction, repair, replacement and preservation of the *Common Area* and other areas *now or hereafter* owned, controlled or maintained by the Association" (Emphasis added.) Additionally, the original declaration indicated that special assessments may be levied "for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair, replacement and preservation of any improvement to the Common Area and other areas *now or hereafter under the control of the Association* and facilities and structures thereon, and the woodlands, wetlands, . . . retaining walls, fixtures and personal property under the control of the Association[.]" (Emphasis added.)

To the extent that Birkdale 1 lot owners are not directly benefited by the retaining walls, drainage work, and various changes made to the parks related to the annexation, this does not form a basis to find the amended declaration invalid. Certainly there will be maintenance costs borne by all of the lot owners in the Association (Birkdale 1 and 2), which costs do not necessarily correlate to actual benefits received by each and every lot owner, yet all must share in the cost as dictated by the declarations that bind the owners by virtue of their decision to buy property within the subdivisions. Maintenance relative to a common area in Birkdale 1 that benefits only Birkdale 1 owners will be paid, in part, by Birkdale 2 owners as they are all in the Association. Indeed, there presumably are maintenance activities that benefit only certain lot owners within Birkdale 1, as opposed to all of Birkdale 1 lot owners, but the cost is shared by all.

With respect to plaintiffs' public policy argument, the facts and circumstances here are not comparable to those in *McMillan v Iserman*, 120 Mich App 785; 327 NW2d 559 (1982). *McMillan* involved housing for the mentally impaired and an attempt to prohibit housing of these individuals in a home on the basis of an amended deed restriction. Such serious issues of public concern are not at work in the case at bar. Moreover, the amended declaration, in and of itself, did not result in disrupting plaintiffs' use of their homes as in *McMillan*, and annexation was expressly contemplated in the original declaration. *McMillan* is factually distinguishable.

Again, this issue addresses the validity and enforceability of the amended declaration, and not the manner in which defendants carried out the amended declaration and annexed Birkdale 2.³

Plaintiffs argue a lack of notice regarding the original declaration, thus they did not know of the possibility of annexation and additional development. The declaration, however, was duly recorded on February 17, 1998, and all of the plaintiffs in this suit purchased their respective properties after that date. Therefore, there was constructive notice to all purchasers that they took their property subject to the declaration, and they were bound by the declaration whether they examined the record or not. See *Piech v Beaty*, 298 Mich 535, 538; 299 NW705 (1941); 1 Cameron, *Michigan Real Property Law* (2d ed), The Michigan Recording Acts, § 11.24, p 382.

Plaintiffs make a detrimental reliance argument; however, there was record notice of the declaration and thus notice of the possibility of amendment and annexation. To the extent that the argument claims reliance on the development scheme as it existed at purchase and destruction of that scheme through the manner in which Birkdale 2 was developed and built, this does not work to negate the validity and enforceability of the amended declaration.

Next, in a related argument, plaintiffs argue that the amended declaration was invalid and unenforceable in that it violated the development scheme for Birkdale 1 by permitting common area improvements that substantially interfered with plaintiffs' property rights accorded to them by the plat and original declaration. Once again, the language of the amended declaration, in and of itself, cannot be read as interfering with plaintiffs' property rights. The question is whether the amended declaration was valid and enforceable, not whether Biltmore's actions were valid and consistent with the original and amended declaration, or whether Biltmore exceeded its authority under the declarations and plat.

Plaintiffs' remaining arguments lack merit and do not form a basis to find the amended declaration invalid and unenforceable. Accordingly, the trial court did not err in its ruling.

C. The Fiduciary Duty Claim

Plaintiffs argue that the trial court erred in concluding that the relationships between the parties were commercial in nature and were governed by contracts, and thus they did not constitute fiduciary relationships.

With regard to a claim of breach of fiduciary duty, a fiduciary relationship arises from the reposing of faith, confidence, and trust, along with the reliance of one upon the judgment and advice of another. *First Public Corp v Parfet*, 246 Mich App 182, 191; 631 NW2d 785 (2001), vacated in part on other grounds 468 Mich 101; 658 NW2d 477 (2003). A fiduciary is under a duty to act for the benefit of the other person concerning matters within the scope of the

³ The *McMillan* decision lends support for the proposition that land use covenants, in general, may include clauses giving grantees or owners the power to amend or extend land use rules and restrictions. *McMillan*, *supra* at 790.

relationship. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (1999). A plaintiff is entitled to relief when a fiduciary relationship arises and the fiduciary's influence has been acquired and abused, or when confidence has been reposed and betrayed. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 508; 536 NW2d 280 (1995). A fiduciary owes a duty to his principal to act in good faith and is not permitted to act for himself at the principal's expense. *Central Cartage Co v Fewless*, 232 Mich App 517, 524-525; 591 NW2d 422 (1998). A fiduciary relationship can be founded, in general, on intimate personal or business relations in which trust or confidence is accepted. *Boden v Renihan*, 299 Mich 226, 239; 300 NW 53 (1941). However, it is unreasonable for a person to repose trust and confidence in another individual where the interests of each are adverse. See *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 260-261; 571 NW2d 716 (1997). For example, a fiduciary duty does not generally arise in the context of a lender-borrower relationship. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 680; 591 NW2d 438 (1998). Mere allegations of inexperience and reliance are insufficient to establish a fiduciary relationship. *Ulrich v Fed Land Bank of St Paul*, 192 Mich App 194, 196; 480 NW2d 910 (1991). Whether to recognize a plaintiff's cause of action for breach of fiduciary duty is a question of law that we review de novo. *Teadt, supra* at 574.

A fiduciary duty did not arise out of Biltmore's relationship with plaintiffs. Biltmore, as property owner and developer, was interested in having the development succeed by selling lots or selling the rights to others to market and sell the lots, and by annexing property to increase the size of the development. Clearly, developer Biltmore's goal was to maximize its profits. Essentially, Biltmore's relationship with plaintiffs was akin to a buyer-seller relationship. Biltmore was permitted to act on its own behalf and for its own benefit, and its interests would not necessarily parallel those of the Birkdale 1 lot owners, and may indeed be considered adverse to the lot owners. A slightly different issue concerns Biltmore's status, not as developer, but as the party who was controlling the Association. In those shoes, it might appear that Biltmore was in a position of trust and confidence relative to plaintiffs as members of the Association and needed to act in a manner that was beneficial to each of those members. However, even the Association, or any subdivision association, acts in the interest and benefit of the subdivision and its members as a whole and not one particular member or small group of members. The Association collects maintenance fees and dues from members and works to ensure compliance with governing rules and restrictions. These duties may at times come into conflict with the plans and wishes of individual members, yet the Association cannot bow to individual members at the expense of what is conceived to be the greater good. No fiduciary relationship existed between Biltmore and plaintiffs regardless whether Biltmore is viewed as simply a developer or as the entity controlling the Association. There were legal contracts, instruments, and other documents that served to guide the rights and obligations of the parties in this commercial enterprise, not fiduciary relationship concepts. For these same reasons, there was no cause of action against defendant Association for breach of fiduciary duty.

D. The Declaratory Judgment Claim

Plaintiffs argue that their claim for a declaratory judgment sought a ruling on a number of existing controversies as well as seeking money damages arising out of the allegations in the complaint; therefore, the trial court erred in granting summary dismissal of the claim.

MCR 2.605 governs actions seeking a declaratory judgment. “In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.” MCR 2.605(A)(1). A judgment for declaratory relief is not precluded where there exists another adequate remedy. MCR 2.605(C). A declaratory judgment is a procedural remedy that constitutes a binding and conclusive adjudication of the rights and status of the litigants. *Associated Builders & Contractors v Dep’t of Consumer & Industry Services Director*, 472 Mich 117, 124; 693 NW2d 374 (2005). MCR 2.605 incorporates traditional restrictions on justiciability such as standing, ripeness, and mootness. *Id.* at 125. The declaratory judgment rule subsumes the requirement that a party demonstrate an interest in the outcome that will ensure sincere and vigorous advocacy. *Id.* at 125-126. The “actual controversy” language found in MCR 2.605 precludes a court from deciding hypothetical issues, but a court is not precluded from reaching issues before actual injuries or losses have occurred; the essential requirement of the term is that a plaintiff plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised. *Id.* at 126. Claims for declaratory relief necessarily derive from claims for substantive relief. *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 128; 537 NW2d 596 (1995). In *Detroit v Michigan*, 262 Mich App 542, 551; 686 NW2d 514 (2004), this Court stated that an actual controversy may exist where declaratory relief is needed to guide a plaintiff’s future conduct. “An actual controversy exists when ‘a declaratory judgment is necessary to guide a plaintiff’s future conduct in order to preserve the plaintiff’s legal rights.’” *Genesis Ctr, PLC v Comm’r of Financial & Ins Services*, 246 Mich App 531, 544; 633 NW2d 834 (2001)(citation omitted). However, as legal commentary reflects, “It is clear enough that, if a case has progressed to the point where a traditional action for damages or for an injunction could be maintained, declaratory relief will not be denied for lack of an actual controversy.” 3 Longhofer, Michigan Court Rules Practice, § 2605.3, p 386. While actions for declaratory relief are intended to minimize avoidable losses and the unnecessary accrual of damages, “declaratory judgment actions can result in monetary relief.” *Durant v Michigan*, 456 Mich 175, 208-209; 566 NW2d 272 (1997). “Pursuant to MCR 2.605(F), a court has the power to grant money damages as are necessary and proper in a declaratory judgment action.” *City of Taylor v The Detroit Edison Co*, 263 Mich App 551, 564; 689 NW2d 482 (2004), appeal gtd 474 Mich 877 (2005), citing *Hofmann v Auto Club Ins Ass’n*, 211 Mich App 55, 90; 535 NW2d 529 (1995).⁴

Plaintiffs minimally stated a claim upon which relief can be granted with respect to a declaratory judgment action. As reflected in plaintiffs’ complaint, there are numerous requests asking the trial court to declare the rights and obligations of the parties. The declaratory relief sought in the complaint relates to both past and future conduct and requires the court to declare the rights and legal relations of the parties predicated on interpretation of the declarations, the plat, the articles of incorporation, the parties’ actions ostensibly taken in furtherance of these documents, and the surrounding circumstances. The trial court is not prohibited from declaring

⁴ “Further necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against a party whose rights have been determined by the declaratory judgment.” MCR 2.605(F).

the parties' rights and obligations as they pertain to the relevant legal instruments and documents and the past actions taken by the parties based on those documents. MCR 2.605's language requiring an actual controversy is satisfied here. While the amended declaration is valid and enforceable, other questions remain. For example, and without limitation, under the declarations (both of them) and the plat, were defendants' actions consistent with those documents and the rights of the lot owners under the documents?⁵ Did defendants have the right, as part of their annexation powers, to undertake the particular actions they did with respect to the park areas?⁶ When is control of the Association to be transferred to the subdivision lot owners and what document controls the transfer? The trial court erred in summarily dismissing the declaratory judgment action as to defendants Biltmore and the Association, and plaintiffs may proceed on this cause of action as framed in the complaint, limited only by any rulings in this opinion.

E. Alleged Embedded Trespass and Nuisance Claims

After plaintiffs' motion to amend was denied, they filed a motion for clarification of status, seeking, in part, a ruling that plaintiffs' request for money damages based on defendants' actions was sufficiently pled and could proceed on theories of trespass and nuisance.⁷ Plaintiffs argue that the complaint included sufficient factual allegations giving rise to trespass and nuisance, which arose out of the same transaction that formed the basis for the other causes of action; therefore, the case should have been allowed to proceed under those theories or claims regardless that they were not specifically identified as causes of action or labeled as individual counts, especially where the allegations reasonably informed defendants of trespass and nuisance.

"Each allegation of a pleading must be clear, concise, and direct." MCR 2.111(A)(1). A complaint must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1). MCR 2.113(E)(3) provides, "Each statement of a claim for relief founded on a single transaction or occurrence or on separate transactions or occurrences, and each defense other than a denial, must be stated in a separately numbered count or defense."

Plaintiffs expressly and clearly identified 10 separate causes of action in a 46-page, 166-paragraph complaint. With respect to claims of trespass and nuisance embedded in the complaint, allowance of those alleged claims would violate MCR 2.113(E)(3) as they were not stated in a separately numbered count. It would have been a simple matter for plaintiffs to

⁵ Defendants themselves state, "[T]he Appellants' apparent dissatisfaction goes to the performance of the Defendants under the constitutive documents, but not to the validity of the documents themselves."

⁶ Answers to these questions necessarily impact the extent of construction and maintenance costs that could lawfully be assessed against plaintiffs.

⁷ Contrary to defendants' arguments, plaintiffs did raise this issue below in the motion for clarification of status.

specify claims of trespass and nuisance. Although there are allegations that may support such claims within the complaint, they are not listed as causes of action upon which plaintiffs sought relief. We will not require a party in defendants' position to decipher all of the potential claims that might flow from the language in the complaint, where plaintiffs themselves have not bothered specifying the causes of action they now claim.

F. Motion for Leave to Amend Complaint

Plaintiffs argue that the trial court erred in refusing to allow them to amend their complaint to add claims of trespass and nuisance.

Because plaintiffs sought to amend their complaint by adding claims for trespass and nuisance long after the commencement of the suit against defendants, amendment was only permissible by leave of the court or by written consent of the adverse party. MCR 2.118(A). "Leave shall be freely given when justice so requires." MCR 2.118(A)(2).⁸ A trial court's decision whether to allow a plaintiff to amend the complaint is reviewed for an abuse of discretion. *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). "Leave to amend should be denied only in the face of undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility." *Id.* The trial court must specify why it is denying a motion to amend the pleadings, and failure to do so requires reversal unless the amendment would be futile. *Id.* at 75-76. "An amendment is futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded." *Id.* at 76. MCR 2.116(I)(5) provides, "If the grounds asserted [in support of summary disposition] are based on subrule (C)(8),(9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified."

A trespass is an unauthorized invasion upon the property of another with the intent to intrude on the other's property without authorization; intrusion due to an accident caused by negligence is insufficient. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195; 540 NW2d 297 (1995). "To recover under nuisance, a plaintiff must prove significant harm caused by the defendant's unreasonable interference with the use or enjoyment of the property." *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 508-509; 686 NW2d 770 (2004).

The trial court failed to explain in any manner whatsoever the reason or reasons why it was denying the motion. The documentary evidence presented by plaintiffs, i.e., the affidavits, would appear to present some support for claims of trespass and nuisance. Therefore, we cannot glean from the record that amendment of the complaint would be futile. Because the trial court failed to give any reasoning for its ruling, and because we are not prepared to conclude that amendment would be futile, we remand to the trial court in order to allow the court an

⁸ "Amendments must be filed in writing, dated, and numbered consecutively, and must comply with MCR 2.113." MCR 2.118(A)(4).

opportunity to specify the grounds for denying the motion. *Dowerk, supra* at 75-76. Of course, the trial court is also free to reconsider its decision should it be so inclined.

G. An Accounting

Plaintiffs argue that the trial court erred in ruling that plaintiffs had failed to state a cause of action for an accounting with respect to defendant Association.

“An action for an accounting is equitable in nature, but whether a plaintiff has stated a cause of action for an accounting must be determined from the facts pled in the plaintiff’s complaint rather than from the prayer for relief.” *Boyd v Nelson Credit Centers, Inc.*, 132 Mich App 774, 779; 348 NW2d 25 (1984). To establish a claim for an accounting, there must be mutual demands, a series of transactions on one side, and payments on the other. *Id.* (citation omitted). Where all the items are on one side, there can be no action for an accounting. *Id.* (citation omitted). An action for an accounting cannot be sustained where the action is for a specific sum due under a contract, and an accounting is unnecessary where discovery is sufficient to determine the amounts at issue. *Id.* The *Boyd* panel, finding that the plaintiffs failed to state a cause of action for an accounting, ruled:

Here, plaintiffs’ complaint contains no allegation of a series of mutual demands. Plaintiffs’ claims are for the refund of specific sums paid under their contracts, or alternatively, for the penalty specified in MCL 445.911(2) The allegations in plaintiffs’ complaint do not support an inference that the transactions at issue are so complex that ordinary discovery procedures would be inadequate. [*Id.* at 779-780.]

An action for an accounting is proper, although the accounts are not mutual, if there are circumstances of great complication or difficulty in the way of adequate relief at law. *Basinger v Provident Life & Accident Ins Co*, 67 Mich App 1, 9; 239 NW2d 735 (1976), quoting *Second Michigan Cooperative Housing Ass’n v First Michigan Cooperative Housing Ass’n*, 358 Mich 252, 256; 99 NW2d 665 (1959). Black’s Law Dictionary (7th ed) defines an accounting as “[a] legal action to compel a defendant to account for and pay over money owed to the plaintiff but held by the defendant[.]”

MCL 450.2487(1), of the Nonprofit Corporation Act, MCL 450.2101 *et seq.*, provides:

Upon written request of a shareholder or member, a corporation shall mail to the shareholder or member its balance sheet as at the end of the preceding fiscal year; its statement of income for such fiscal year; and, if prepared by the corporation, its statement of source and application of funds for such fiscal year.

The articles of incorporation indicate that the Association was formed pursuant to the Nonprofit Corporation Act. Defendants do not respond to this argument.

The gist of the action involves a claim for documents concerning Association revenues received from the lot owners, including Association dues. This claim is directed at acquiring information in an attempt to show that lot owners were paying dues that covered Biltmore’s development of Birkdale 2, and specifically construction of the retaining walls and the

construction (or destruction) of the park areas that allegedly benefited only Birkdale 2 owners, and which costs, plaintiffs claim, should not be borne by them. Plaintiffs alleged that their requests for the documents went unanswered.

With respect to an accounting action under the common law, the claim was properly dismissed because plaintiffs had the opportunity to obtain the information via discovery. Additionally, the case law prerequisites set forth above have not been satisfied. MCL 450.2487(1), however, serves as a basis to order the Association to turn over its balance sheet showing its income and, if prepared by the Association, a statement showing the source and application of funds. On this statutory claim, an order granting summary disposition in favor of plaintiffs shall enter on remand, with the Association being ordered to comply with MCL 450.2487(1).

H. Conclusion

In sum, we affirm the trial court's ruling that the amended declaration was valid and enforceable, affirm the dismissal of the breach of fiduciary duty claims brought against defendants, and affirm the court's ruling rejecting plaintiffs' argument that there existed embedded trespass and nuisance claims within the complaint that should have been allowed to proceed. We reverse the trial court's dismissal of the declaratory judgment claim with respect to Biltmore and the Association and remand for further proceedings, reverse the dismissal of the accounting claim as pursued under MCL 450.2487(1) only and remand for entry of judgment in favor of plaintiffs pursuant to that statute, and remand in regard to the court's ruling denying the motion to amend the complaint for further findings.⁹

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Patrick M. Meter

⁹ We reject plaintiffs' argument that summary disposition should not have been granted in favor of the Association because it never filed a motion for summary disposition. Because of the unusual and unique posture of this case as it played out below, the court was well within its authority to render a ruling. Plaintiffs' motion for clarification of status was essentially a motion claiming that prior summary disposition rulings had not disposed of all counts against all defendants. This required the court to address summary disposition issues. MCR 2.116(I) allows the court to dispose of the case in the manner that occurred here.